The Government of Malaysia & Anor v Ian Chin Hon Chong (for himself and on behalf of all the affected judges who were appointed to the High Court in Sabah and Sarawak before 1 July 2015 and receiving their pensions and on behalf of all persons who are receiving their derivative pensions on account of the death of such judges)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-01(NCVC)(A)-10–01 OF 2023
RAVINTHRAN, AZIMAH OMAR AND LIM CHONG FONG JJCA
7 MAY 2024

Constitutional Law — Judges — Remuneration — Pension — New formula for adjustment of judges' pension brought about by Judges Remuneration (Amendment) Act 2014 ('Act A1462') — Appeal against decision of High Court in declaring Act A1462 null and void and ordering appellants to pay respondent to make up for 'shortfall' in adjustment of pension — Whether judges' pension right or ex gratia payment — Whether right or merely additional assistance — Whether Act A1462 disadvantageous — Whether Judges' Remuneration (Amendment of First and Fifth Schedules) Regulations 2016 ('PU(A) 59/2016') applied to judges' pensions — Whether PU(A) 59/2016 nullified if Act A1462 held to be void

The respondent was appointed as a judicial commissioner on 1 March 1992. Subsequently, on 20 August 1993, he was appointed as a judge of the High Court of Borneo (now High Court of Sabah and Sarawak). He retired on 1 December 2009 after serving 16 years and nine months as a judicial commissioner and a High Court judge and qualified for a pension. Under the then existing law, ie s 15B of the Judges Remuneration Act 1971 ('the JRA'), the pension of a retired judge and the derivative pension was subject to adjustment with reference to 'current salary' in accordance with the formula given in the now deleted Third and Fourth Schedules of the JRA which were were introduced to the JRA through the Judges' Remuneration (Amendment) Act 1984 ('Act A609') that operated retrospectively with effect from 1 July 1980. The adjustment formula changed when Parliament passed the Judges' Remuneration (Amendment) Act 2014 ('Act A1462'). The Third and Fourth Schedules were deleted from the JRA. Judges' pensions and derivative pensions would no longer be increased with reference to the current salary of a serving judge under the statutory formulae given in the Third and Fourth Schedules. Instead, under the new s 15B(1), judges' pensions and derivative pensions would be adjusted by a flat rate of two percent increase at the beginning of each year. However, s 15B(2) provided that in the case of a judge appointed before

the coming into operation of the new law, the Yang di-Pertuan Agong 'may' prescribe 'an appropriate higher percentage' if the two percent rate would result in a situation that was less favourable. The respondent would come within this clause as he was appointed as a judge in 1993. The salary of serving judges was revised with effect from 1 July 2015 vide the Judges' Remuneration (Amendment of First and Fifth Schedules) Regulations 2016 ('PU(A) 59/2016'). The respondent's case was that because of the new amending law ie Act A1462 which introduced a flat increment of two percent at the beginning of each year, he was placed in a disadvantageous position as he was received a much smaller increment to his pension than he would have otherwise been entitled to. The other named judges on whose behalf the respondent had instituted this action suffered similar disadvantages. The originating summons of the respondent was allowed where the learned High Court judge ('HCJ'): (a) found that pension adjustment was a right that was protected under art 125(7) of the Federal Constitution; (b) rejected the argument of the appellants that the salary increment granted on 1 July 2015 through PU(A) 59/2016 to serving judges was not 'intended' to apply to retired judges' pension and derivative pensions; (c) declared that Act A1462 was void for being inconsistent with art 125(7) of the Federal Constitution. The HCJ ordered the appellants to pay the affected judges to make up for the 'shortfall' in the adjustment of their respective pensions. Hence, this appeal by the appellant. The respondent also cross-appealed regarding the order that two percent increment already paid should be deducted from the calculation of the 'shortfall' amount.

Held, dismissing the appeal and allowing the cross-appeal:

(1) **(per Ravinthran JCA, majority)** The JRA had without any qualification provided that a retired judge was 'entitled' to a pension. Section 3 of the JRA stated the right to a pension and s 4 of the JRA provided the computation. These provisions employ the imperative 'shall'. The words of s 5 of the Pensions Ordinance 1951 where it was stated that pension was not an 'absolute right' were repeated in s 3 of the Pensions Act 1980 which was applicable to civil servants. However, in the JRA, the right to a pension was not qualified in any manner. Thus, the argument that judges' pensions were an 'ex gratia' payment was untenable. The pension paid to a retired judge as provided in the JRA, was a right and not an ex gratia payment (see paras 24–26).

(2) **(per Ravinthran JCA, majority)** The Hansard reports could not be relied upon to determine whether the pension adjustment was a protected constitutional right or merely an additional benefit. By linking judges' pensions to the current salary of serving judges, s 15B(1) of the JRA and the Third and Fourth schedules to the JRA unquestionably granted an advantage to judges in 1984. Thus, when the respondent was appointed as a High Court judge in 1993, he immediately obtained an accrued right to the effect that his future

pension would be revised upwards from time to time by being pegged to the current salary of a serving judge. The speeches could not detract from the fact that the prevailing law vested a right on the respondent in respect of pension adjustment and not a mere discretionary benefit at the time he joined the judiciary. Article 125(7) of the Federal Constitution stated that the remuneration of a judge and 'other terms of office (including pension rights)' shall not be altered to his disadvantage after his appointment. Since on the date of the respondent's appointment as a High Court judge, Act A609 had already amended the JRA to peg judges' pensions to the current salary of a serving judge and was the prevailing law, the mode of adjustment of pension was a protected 'pension right' that could not be altered to his disadvantage by later law (see paras 34 & 37–39).

(3) **(per Ravinthran JCA, majority)** The respondent had proven that the impugned law ie Act A1462 was disadvantageous to his protected 'pension rights'. The new s 15B(2), while acknowledging that the annual flat rate pension increment of two per cent may be detrimental to judges who joined the judiciary earlier, it did not grant any automatic right of remedy because it used the permissive 'may'. Act A1462 that removed a pension right, ie the prevailing mode of adjustment of pension when the respondent joined the judiciary, was clearly disadvantageous within the meaning of art 125(7) read with cl (9) of the Federal Constitution (see paras 40–41 & 43).

(4) **(per Ravinthran JCA, majority)** Since the removal of the Third and Fourth schedules in the JRA was unconstitutional, PU(A) 59/2016 would also apply to the pensions of judges who joined the judiciary before 1 July 2015 in accordance with the old s 15B(1) of the JRA. Articles 125(7) and 147 of the Federal Constitution were meant to protect pension rights from detrimental changes in later law. Thus, the issue in this case and the case of *The Government of Malaysia & Anor v Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public service)* [2023] 5 MLJ 32 ('Aminah Ahmad') essentially turned on the breadth of the protection of pension rights granted by the Federal Constitution (see paras 45 & 52).

(5) **(per Ravinthran JCA, majority)** PU(A) 59/2016 was not made under the authority of the amending law, ie Act A1462 but rather under the principal law governing judges' remuneration and pensions which was the JRA. Salaries of judges were provided under the First Schedule of the JRA. Thus, the argument that PU(A) 59/2016 would be voided was without merit (see paras 53 & 55).

(6) **(per Lim Chong Fong JCA, dissenting)** The court was not bound by *Aminah Ahmad* cases by virtue of stare decisis because they dealt with art 147 of the Federal Constitution which applied only to public servants.

Legal decision making particularly in the situation where a person was allegedly disadvantaged could not and must not operate in a vacuum because justice must ultimately be done based on the circumstances of the case. Deciding including constitutional interpretation based merely on hypothetical factual risk and possibility was unsatisfactory. Act A1462 could not be simply struck down or declared void for violating art 125(7) read with art 125(9) of the Federal Constitution per se based on the existence of a hypothetical risk or mere possibility of disadvantage to the pensioner (see paras 74, 77 & 79).

(7) **(per Lim Chong Fong JCA, dissenting)** Article 125(7) read with art 125(9) of the Federal Constitution as well as the related statutes the JRA, Act A1462 and PU(A) 59/2016 were nonetheless subject to art 8 of the Federal Constitution. Article 8 of the Federal Constitution provided for discrimination between persons if there was reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question. Act A1462 applied to current and future retired judges and PU(A) 59/2016 applied to serving judges. Therefore, there was proper, proportionate and reasonable differentiation to discriminate against the respondents by excluding them from the benefit conferred by PU(A) 59/2016. Consequently, both Act A1462 and PU(A) 59/2016 were constitutional and valid when they were read and applied together, contrary to the respondents' contention that Act A1462 was invalidated as the result of PU(A) 59/2016. The benefit conferred by PU(A) 59/2016 was inapplicable to the respondents and accordingly, the respondents had failed to prove there was actual loss suffered as so computed and contended by them. It followed that the respondents had not proved there was any disadvantage suffered to support their challenge as so prayed and allowed by the High Court. The learned High Court judge's findings were erroneous and that justified appellate intervention. Thus, the appeal was allowed and the cross-appeal was dismissed (see paras 86–87, 89–93 & 95).

[Bahasa Malaysia summary

Responden telah dilantik sebagai pesuruhjaya kehakiman pada 1 Mac 1992. Kemudian, pada 20 Ogos 1993, beliau dilantik sebagai hakim Mahkamah Tinggi Borneo (kini Mahkamah Tinggi Sabah dan Sarawak). Beliau bersara pada 1 Disember 2009 selepas berkhidmat selama 16 tahun dan sembilan bulan sebagai pesuruhjaya kehakiman dan hakim Mahkamah Tinggi dan layak menerima pencen. Di bawah undang-undang yang sedia ada ketika itu, iaitu s 15B Akta Saraan Hakim 1971 ('ASH'), pencen hakim yang bersara dan pencen terbitan tertakluk kepada pelarasan dengan merujuk kepada 'gaji semasa' mengikut formula yang diberikan dalam Jadual Ketiga dan Keempat ASH yang telah dihapuskan, yang diperkenalkan kepada ASH melalui Akta Saraan

Hakim (Pindaan) 1984 ('Akta A609') yang beroperasi secara retrospektif berkuatkuasa 1 Julai 1980. Formula pelarasan berubah apabila Parlimen meluluskan Akta Saraan Hakim (Pindaan) 2014 ('Akta A1462'). Jadual Ketiga dan Keempat telah dihapuskan daripada ASH. Pencen hakim dan pencen terbitan tidak lagi akan dinaikkan dengan merujuk kepada gaji semasa hakim yang berkhidmat di bawah formula statutori yang diberikan dalam Jadual Ketiga dan Keempat. Sebaliknya, di bawah s 15B(1) yang baharu, pencen hakim dan pencen terbitan akan dilaraskan dengan kadar tetap kenaikan dua peratus pada permulaan setiap tahun. Walau bagaimanapun, s 15B(2) memperuntukkan bahawa dalam kes hakim yang dilantik sebelum berkuat kuasanya undang-undang baharu, Yang di-Pertuan Agong 'boleh' menetapkan 'peratusan yang lebih tinggi yang sesuai' jika kadar dua peratus itu akan mengakibatkan keadaan yang kurang menguntungkan. Responden akan termasuk dalam klausa ini kerana beliau dilantik sebagai hakim pada tahun 1993. Gaji hakim yang sedang berkhidmat telah disemak semula berkuat kuasa 1 Julai 2015 melalui Peraturan-Peraturan Saraan Hakim (Pindaan Jadual Pertama dan Kelima) 2016 ('PU(A) 59/2016'). Tuntutan responden adalah bahawa disebabkan undang-undang pindaan baharu iaitu Akta A1462 yang memperkenalkan kenaikan tetap dua peratus pada permulaan setiap tahun, beliau diletakkan dalam kedudukan yang tidak menguntungkan kerana beliau menerima kenaikan pencen yang jauh lebih kecil daripada yang sepatutnya beliau terima. Hakim-hakim lain yang dinamakan bagi pihak responden yang telah memulakan tindakan ini mengalami kerugian yang sama. Saman pemula responden dibenarkan di mana hakim Mahkamah Tinggi ('HMT'): (a) mendapati bahawa pelarasan pencen adalah hak yang dilindungi di bawah perkara 125(7) Perlembagaan Persekutuan; (b) menolak hujahan perayu bahawa kenaikan gaji yang diberikan pada 1 Julai 2015 melalui PU(A) 59/2016 kepada hakim yang berkhidmat tidak 'dimaksudkan' untuk dikenakan kepada pencen hakim yang bersara dan pencen terbitan; (c) mengisytiharkan bahawa Akta A1462 adalah terbatal kerana tidak konsisten dengan perkara 125(7) Perlembagaan Persekutuan. HMT memerintahkan perayu membayar hakim yang terjejas untuk menampung 'kekurangan' dalam pelarasan pencen masing-masing. Oleh itu, rayuan ini oleh perayu. Responden juga membuat rayuan balas berhubung arahan bahawa kenaikan dua peratus yang telah dibayar hendaklah ditolak daripada pengiraan jumlah 'kekurangan'.

Diputuskan, menolak rayuan dan membenarkan rayuan balas:

(1) **(oleh Ravinthran HMR, majoriti)** ASH telah tanpa sebarang syarat menyatakan bahawa seorang hakim yang bersara 'berhak' kepada pencen. Seksyen 3 ASH menyatakan hak kepada pencen dan s 4 ASH menyediakan pengiraannya. Peruntukan ini menggunakan perkataan imperatif 'akan'. Perkataan s 5 Ordinan Pencen 1951 di mana dinyatakan bahawa pencen bukanlah 'hak mutlak' telah diulang dalam

s 3 Akta Pencen 1980 yang terpakai kepada penjawat awam. Walau bagaimanapun, dalam ASH, hak kepada pencen tidak disyaratkan dengan apa-apa cara. Oleh itu, hujahan bahawa pencen hakim adalah pembayaran 'ex gratia' adalah tidak berasas. Pencen yang dibayar kepada hakim yang bersara seperti yang diperuntukkan dalam ASH, adalah satu hak dan bukan pembayaran ex gratia (lihat perenggan 24–26).

(2) **(oleh Ravinthran HMR, majoriti)** Laporan Hansard tidak boleh diharapkan untuk menentukan sama ada pelarasan pencen adalah hak perlembagaan yang dilindungi atau hanya faedah tambahan. Dengan mengaitkan pencen hakim kepada gaji semasa hakim yang berkhidmat, s 15B(1) ASH dan jadual Ketiga dan Keempat ASH tidak dinafikan memberikan kelebihan kepada hakim pada tahun 1984. Oleh itu, apabila responden dilantik sebagai hakim Mahkamah Tinggi pada tahun 1993, beliau serta-merta memperoleh hak terakru yang menyatakan bahawa pencen masa depannya akan disemak semula dari semasa ke semasa dengan dikaitkan kepada gaji semasa hakim yang berkhidmat. Ucapan-ucapan tidak dapat menafikan hakikat bahawa undang-undang yang berkuat kuasa telah memberikan hak kepada responden berkenaan pelarasan pencen dan bukan sekadar faedah budi bicara pada masa beliau menyertai badan kehakiman. Perkara 125(7) Perlembagaan Persekutuan menyatakan bahawa imbuhan seorang hakim dan 'syarat-syarat perkhidmatan yang lain (termasuk hak pencen)' tidak boleh diubah kepada kemudaratannya selepas pelantikannya. Oleh kerana pada tarikh pelantikan responden sebagai hakim Mahkamah Tinggi, Akta A609 telah pun meminda ASH untuk mengaitkan pencen hakim kepada gaji semasa hakim yang berkhidmat dan merupakan undang-undang yang berkuat kuasa, kaedah pelarasan pencen adalah 'hak pencen' yang dilindungi yang tidak boleh diubah kepada kemudaratannya oleh undang-undang kemudian (lihat perenggan 34 & 37–39).

(3) **(oleh Ravinthran HMR, majoriti)** Responden telah membuktikan bahawa undang-undang yang dipersoalkan iaitu Akta A1462 adalah merugikan 'hak pencen' yang dilindungi. Seksyen 15B(2) yang baharu, walaupun mengakui bahawa kenaikan pencen kadar tetap tahunan sebanyak dua peratus mungkin merugikan hakim yang menyertai badan kehakiman lebih awal, ia tidak memberikan sebarang hak remedi automatik kerana ia menggunakan perkataan permisif 'boleh'. Akta A1462 yang menghapuskan hak pencen, iaitu kaedah pelarasan pencen yang berkuat kuasa apabila responden menyertai badan kehakiman, jelas merugikan mengikut maksud perkara 125(7) dibaca bersama perkara (9) Perlembagaan Persekutuan (lihat perenggan 40–41 & 43).

(4) **(oleh Ravinthran HMR, majoriti)** Oleh kerana penghapusan Jadual Ketiga dan Keempat dalam ASH adalah tidak berperlembagaan, PU(A)

A 59/2016 juga akan terpakai kepada pencen hakim yang menyertai badan kehakiman sebelum 1 Julai 2015 mengikut s 15B(1) ASH yang lama. Perkara 125(7) dan 147 Perlembagaan Persekutuan bertujuan untuk melindungi hak pencen daripada perubahan yang memudaratkan dalam undang-undang kemudian. Oleh itu, isu dalam
B kes ini dan kes *The Government of Malaysia & Anor v Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public service)* [2023] 5 MLJ 32 ('Aminah Ahmad') pada dasarnya bergantung kepada keluasan perlindungan hak pencen yang diberikan oleh Perlembagaan Persekutuan (lihat perenggan 45 & 52).
C

(5) **(oleh Ravinthran HMR, majoriti)** PU(A) 59/2016 tidak dibuat di bawah kuasa undang-undang pindaan, iaitu Akta A1462 tetapi di bawah undang-undang utama yang mengawal saraan dan pencen hakim iaitu ASH. Gaji hakim disediakan di bawah Jadual Pertama ASH. Oleh
D itu, hujahan bahawa PU(A) 59/2016 akan terbatal adalah tanpa merit (lihat perenggan 53 & 55).

(6) **(oleh Lim Chong Fong HMR, menentang)** Mahkamah tidak terikat dengan kes *Aminah Ahmad* berdasarkan prinsip stare decisis kerana
E kes-kes itu berkaitan dengan perkara 147 Perlembagaan Persekutuan yang hanya terpakai kepada penjawat awam. Pembuatan keputusan undang-undang, terutamanya dalam situasi di mana seseorang didakwa dirugikan, tidak boleh dan tidak harus beroperasi secara terpencil kerana keadilan akhirnya mesti ditegakkan berdasarkan keadaan kes tersebut.
F Memutuskan untuk memasukkan tafsiran perlembagaan semata-mata berdasarkan risiko dan kemungkinan fakta hipotesis adalah tidak memuaskan. Akta A1462 tidak boleh semata-mata digugurkan atau diisytiharkan tidak sah kerana melanggar perkara 125(7) dibaca bersama perkara 125(9) Perlembagaan Persekutuan semata-mata
G berdasarkan kewujudan risiko hipotesis atau kemungkinan kerugian kepada penerima pencen (lihat perenggan 74, 77 & 79).

(7) **(oleh Lim Chong Fong HMR, menentang)** Walaupun perkara 125(7) dibaca bersama perkara 125(9) Perlembagaan Persekutuan, serta undang-undang berkaitan iaitu JRA, Akta A1462 dan PU(A) 59/2016,
H ia tetap tertakluk kepada perkara 8 Perlembagaan Persekutuan. Perkara 8 Perlembagaan Persekutuan memperuntukkan diskriminasi antara individu sekiranya terdapat klasifikasi munasabah berdasarkan perbezaan yang jelas yang mempunyai hubungan atau perkaitan yang rasional dengan dasar atau objektif yang ingin dicapai oleh
I undang-undang atau peruntukan undang-undang yang berkenaan. Akta A1462 terpakai kepada hakim-hakim bersara sedia ada dan akan datang, manakala PU(A) 59/2016 terpakai kepada hakim-hakim yang sedang berkhidmat. Oleh itu, terdapat pembezaan yang wajar, seimbang dan munasabah untuk mendiskriminasikan responden dengan

mengecualikan mereka daripada faedah yang diberikan oleh PU(A) 59/2016. Oleh itu, kedua-dua Akta A1462 dan PU(A) 59/2016 adalah berperlembagaan dan sah apabila dibaca dan diguna pakai bersama, bercanggah dengan hujah responden bahawa Akta A1462 adalah tidak sah akibat PU(A) 59/2016. Faedah yang diberikan oleh PU(A) 59/2016 tidak terpakai kepada responden dan oleh itu, responden telah gagal membuktikan terdapat kerugian sebenar yang ditanggung seperti yang dikira dan dihujahkan oleh mereka. Justeru, responden tidak membuktikan terdapat sebarang kerugian yang ditanggung untuk menyokong cabaran mereka seperti yang dimohon dan dibenarkan oleh Mahkamah Tinggi. Penemuan hakim Mahkamah Tinggi adalah salah dan itu membenarkan campur tangan rayuan. Oleh itu, rayuan dibenarkan dan rayuan balas ditolak (lihat perenggan 86–87, 89–93 & 95).]

Cases referred to

Alma Nudo Atenza v PP and another appeal [2019] 4 MLJ 1; [2019] 5 CLJ 780, FC (refd)

Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor [2022] 4 MLJ 74; [2022] 2 CLJ 726, CA (refd)

The Government of Malaysia & Anor v Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public service) [2023] 5 MLJ 32; [2023] 8 CLJ 1, FC (folld)

Chintaman Rao v the State of Madhya Pradesh 1950 SCR 759, SC (refd)

Chor Phaik Har v Farlim Properties Sdn Bhd [1994] 3 MLJ 345, FC (refd)

Government of Malaysia v VR Menon [1990] 1 MLJ 277, SC (refd)

Haji Wan Othman & Ors v Government of the Federation of Malaya [1965] 2 MLJ 31 (refd)

Ian Chin Hon Chong (for himself and on behalf of all the affected judges who were appointed to the High Court in Sabah and Sarawak before 1 July 2015 and receiving their pensions and on behalf of all persons who are receiving their derivative pensions on account of the death of such judges) v The Government of Malaysia & Anor [2023] 11 MLJ 821; [2023] 4 CLJ 198, HC (refd)

Khoniakina v Georgia (App No 17767/08) [2012] ECHR 17767/08 (refd)

MacKay v Manitoba [1989] 2 SCR 357, SC (refd)

Manitoba Provincial Judges Assn v Manitoba (Minister of Justice) [1997] 3 SCR 3 (refd)

Pepper (Inspector of Taxes) v Hart and related appeals [1993] 1 All ER 42, HL (refd)

Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice); Ontario Judges' Assn v Ontario (Management Board); Bodner v Alberta; Conférence des juges du Québec v Quebec (Attorney General); Minc v Quebec (Attorney General) [2005] 2 SCR 286, SC (refd)

PP v Datuk Harun bin Haji Idris & Ors [1976] 2 MLJ 116; [1976] CLJU 180, HC (refd)

Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island R v Campbell; R v Ekmecic; R v Wickman Manitoba Provincial Judges Assn v Manitoba (Minister of Justice) [1997] 3 SCR 3, SC (refd)

Raja Mohktar bin Raja Yaacob v Public Trustee, Malaysia [1970] 2 MLJ 151 (refd)

Legislation referred to

Federal Constitution arts 8, 125, 125(6), (7), (9), 147, 147(1), (3)
Judges Remuneration Act 1971 ss 4, 6, 7, 7A, 14, 15B, 15B(1), (2), 19, Third Schedule, Fourth Schedule
Pensions Act 1980 ss 3, 5
Pensions Adjustment Act 1980 s 3, 3(2)
Pensions Ordinance 1951 (repealed)
Pensions Ordinance 1971 (repealed)

Appeal from: *Ian Chin Hon Chong (for himself and on behalf of all the affected judges who were appointed to the High Court in Sabah and Sarawak before 1 July 2015 and receiving their pensions and on behalf of all persons who are receiving their derivative pensions on account of the death of such judges) v The Government of Malaysia & Anor* [2023] 11 MLJ 821 (High Court, Kota Kinabalu)

Shamsul bin Bolhassan (with Liew Horng Bin and Kogilambigai a/p Muthusamy) (Attorney General's Chambers) for the appellants.
Ian Chin Hon Chong (with Arthur Chin Chong Loong) (Arthur Chin & Assoc) for the respondents.

Ravinthran JCA (delivering majority judgment of the court):

INTRODUCTION

[1] Datuk Ian Chin Hon Chong is a retired judge. In the High Court, he successfully challenged legislation that provided a new formula for adjustment of judges' pensions on the ground that it is disadvantageous and therefore infringed a constitutionally protected right accorded to judges. Hence, the main appeal is by the Government of Malaysia and the Public Service Department who are aggrieved by the said decision of the High Court that declared the legislation in question null and void and ordered them to pay the affected judges to make up for the 'shortfall' in the adjustment of their respective pensions. The cross-appeal is by the respondent. It is in respect of the order of the High Court that some deduction must be made in the calculation of the 'shortfall' to take into account monies already paid.

[2] The action was brought by Datuk Ian Chin Hon Chong on behalf of himself and all other retired judges of the High Court of Sabah and Sarawak who were appointed before 1 July 2015 and all those receiving derivative pensions on account of the death of the affected judges. For the sake of convenience, I shall refer to Datuk Ian Chin Hon Chong as the respondent and the pension that is the subject of contention as judges' pensions although the same principle would also apply to derivative pensions.

BACKGROUND FACTS

[3] The detailed background facts have been sufficiently set out in the High Court judgment. I shall summarise some essential facts below.

[4] The respondent was appointed as a judicial commissioner on 1 March 1992. Subsequently, on 20 August 1993, he was appointed as a judge of the High Court of Borneo (now High Court of Sabah and Sarawak). He retired on 1 December 2009 after serving 16 years and nine months (a total of 201 months) as a judicial commissioner and a High Court judge. He qualified for a pension. Under the then existing law, ie s 15B of the Judges Remuneration Act 1971 (Act 45) ('the JRA'), the pension of a retired judge and the derivative pension was subject to adjustment with reference to 'current salary' in accordance with the formula given in the now deleted Third and Fourth Schedules of the JRA. Section 15B(1), prior to amendment, read as follows:

> 15B(1) Subject to Part III and this Part, pensions and other benefits granted to Judges and their dependants under that Part before or *on the implementation of any current salary shall be adjusted in accordance with this Act and shall be paid or be payable with effect from the date of implementation of the current salary*. (Emphasis added.)

[5] The formula given in the Third Schedule for the adjustment of the pension of a judge read as follows:

> 1/360 x number of months of service (subject to not more than 216 months) corresponding last drawn salary; as adjusted, which is paid or payable in the case of a judge who retires under section 8(d) or under section 8A shall not be less that 1/5 of the judge's *corresponding last drawn salary*. (Emphasis added.)

[6] A similar formula was provided in the Fourth Schedule for derivative pensions. The above provisions enacted that a retired judge's pension and derivative pension will be adjusted whenever the current salary of the serving judge was increased in accordance with the formulae in the Third and Fourth Schedules. It follows that if the salary increment given to a serving judge is substantial, the increment in the pension of a retired judge would similarly be substantial. However, on the other hand, in a situation of prolonged absence of salary revision, the pension of a retired judge would remain stagnant

indefinitely regardless of the increase in the costs of living. Thus, judges' pensions were not tied to the actual last drawn salary of the retired judge. The formulae prescribed in the Third and Fourth Schedules were introduced to the JRA through the Judges' Remuneration (Amendment) Act 1984 (Act A609) that operated retrospectively with effect from 1 July 1980.

[7] The adjustment formula changed when Parliament passed the Judges' Remuneration (Amendment) Act 2014 (Act 1462). The Third and Fourth Schedules were deleted from the JRA. Judges' pensions and derivative pensions would no longer be increased with reference to the current salary of a serving judge under the statutory formulae given in the Third and Fourth Schedules. Instead, under the new s 15B(1), Judges' pensions and derivative pensions would be adjusted by a flat rate of two percent increase at the beginning of each year. However, s 15B(2) provided that in the case of a judge appointed before the coming into operation of the new law, the Yang di-Pertuan Agong 'may' prescribe 'an appropriate higher percentage' if the two percent rate would result in a situation that is less favourable. The respondent would come within this clause as he was appointed as a judge in 1993. However, it is not in dispute that this provision was never invoked to remedy any unfavourable situation for retired judges since the Judges' Remuneration (Amendment) Act 2014 (Act 1462) was passed.

[8] For ease of reference, I reproduce the new s 15B below:

> (1) Subject to Part III and this Part, pensions and other benefits granted to Judges and their dependants under this Act shall *be adjusted annually by an increment of two percent* in accordance with the provisions of this Act and shall be paid or be payable with effect from January of each year.
>
> (2) Notwithstanding subsection (1), where the application of the specified rate of increment would result in a situation *that is less favourable to a Judge appointed before the coming into operation of this section*, the Yang di-Pertuan Agong may, by order in the Gazette, *prescribe an appropriate higher percentage to be applied in such case*. (Emphasis added.)

[9] The new s 15B came into force on 1 January 2014. Thus, from this day onwards judges' pensions and derivative pensions were subject to a flat two percent increment at the beginning of each year regardless of the revision of the salary of serving judges. Accordingly, the respondent's pension was adjusted by a two per cent increase annually since 2014. For perspective, the respondent pointed out that at the beginning of 2015, the two-percent increment amounted to RM202.23 and at the beginning of 2016 it amounted to RM206.30.

COMPLAINT OF RESPONDENT

[10] The salary of serving judges was revised with effect from 1 July 2015 vide PU (A) 59/2016. The substantive salary of a High Court judge was increased from RM17,754.76 to RM26,500. Under the old formula prescribed in the Third Schedule, the pension of the respondent would have increased on 1 July 2015 from RM10,313.55 to RM14,795.82. This is because the old formula for calculating judges' pensions, ie '1/360 x number of months of service (subject to not more than 216 months) x corresponding last drawn salary', which is pegged to the current salary and not the actual last drawn salary.

[11] The respondent's case is that because of the new amending law, ie the Judges' Remuneration (Amendment) Act 2014 (Act 1462) which introduced a flat increment of two percent at the beginning of each year, he was placed in a disadvantageous position as he was received a much smaller increment to his pension than he would have otherwise been entitled to. The calculation of the amount of pension that he was 'short paid' between July of 2015 and February of 2022 has been tabulated (Table 1) by the respondent and reproduced in the judgment of the High Court. The total amount 'short paid' to the respondent after deducting the two per cent increment since the beginning of 2014 is stated to be RM301,768.60. The High Court noted that the appellants did not dispute the computation stated in Table 1. The other named judges on whose behalf the respondent has instituted this action suffered similar disadvantages. The calculation with regarding their loss was pleaded in the affidavits of their respective widows and executors and is set out in the judgment of the High Court. The appellants did not dispute the computation of the pleaded loss.

DECISION OF HIGH COURT

[12] The learned High Court judge found that pension adjustment is a right that is protected under art 125(7) of the Federal Constitution. His Lordship rejected the argument of the appellants that the salary increment granted on 1 July 2015 through PU (A) 59/2016 to serving judges was not 'intended' to apply to retired judges' pension and derivative pensions.

[13] The originating summons of the respondent was allowed. The prayers sought in the originating summons are as follows:

> (A) A declaration that the Defendants had violated and continue to violate Article 125(7) (read with Article 125(9) of the Federal Constitution when they failed and continue to fail to pay the monthly pension due to the Plaintiff Ian Chin Hon Chong in accordance with the formula of ' 1/360 x 201 months x current salary of a judge but not more than 3/5 of that salary';
>
> (B) A declaration that Judges' Remuneration (Amendment) Act 2014 (Act A 1462)

A is void for being inconsistent with Article 125(7) (read with Article 125(9)) of the Federal Constitution;

(C) An order that the Defendants pay the Plaintiff Ian Chin Hon Chong the sum of RM301,768.60 being the shortfall in the pensions paid to the Plaintiff Ian Chin Hon Chong for the period July 2015 to Feb 2022 with interest at 5% p.a. from the date of judgment until payment;

B

(D) An order that the Defendants pay prejudgment interest on the said sum of RM301,768.60 at the rate of 5% p.a. until judgment to be calculated based on the separate sums that make up the total of RM301,768.60 viz:

C

(1) 5% p.a. from 31 December 2015 on the sum of RM26,893.68 until judgment;

(2) 5% p.a. from 31 December 2016 on the sum of RM51,312.12 until judgment;

D

(3) 5% p.a. from 31 December 2017 on the sum of RM48,787.44 until judgment;

(4) 5% p.a. from 31 December 2018 on the sum of RM46,212.24 until judgment;

E

(5) 5% p.a. from 31 December 2019 on the sum of RM43,585.56 until judgment;

(6) 5% p.a. from 31 December 2020 on the sum of RM40.906.32 until judgment;

F

(7) 5% p.a. from 31 December 2021 on the sum of RM38,173.56 until judgment; and

(8) 5% p.a. from 1 March 2020 on the sum of RM5,897.68 until judgment.

An order that the Defendants pay all the judges and derivative pension holders who are represented by this action the arrears of the pension and to pay the amount computed under the law then existing ignoring the Judges' Remuneration (Amendment) Act 2014 (Act A1462) as this Act is void for being inconsistent with Article 125(7) (read with Article 125(9)) of the Federal Constitution.

G

[14] The learned High Court judge granted relief as reflected in the following paragraphs of his written judgment:

H

[75] Based on the aforesaid reasons, encl 1 is allowed in terms of prayers A, B and C and also under prayer F of encl 1:

(i) an order in terms of para 5(a) of the affidavit of Christopher Ho Ming Ken affirmed on 22 day of February 2022 (encl 7); and

I

(ii) an order in terms of para 3(a) of the affidavit of Catherine Lee affirmed on 22 day of February 2022 (encl 6).

(iii) an order in terms of para 11 and table 1 ('TYH1') of the affidavit of Ten Yaw Hee affirmed on 10 May 2022 (encl 26).

[15] Essentially, the appellants were ordered to pay the respondent and other named judges or the dependants that he represented, a sum representing the shortfall in pensions between the period July 2015 and February 2022 as stated in the affidavits filed in support of the originating summons. In respect of the respondent, this sum amounted to RM301,768.60. In respect of the unnamed judges, it was declared that they are at liberty to apply for consequential orders to give effect to the judgment as the payments due to them were not stated in the affidavits. It was also ordered that the two per cent increment already paid should be deducted from the above mentioned 'short paid' amount. This is the subject of the cross-appeal by the respondent as he argued that the two percent payment was already accounted for and deducted in the calculation of the 'short paid' amount stated in the tables. Finally, it was declared that the Judges Remuneration (Amendment) Act 2014 (Act A1462) is void for being inconsistent with art 125(7) of the Federal Constitution.

ISSUES IN THE APPEAL

[16] The learned senior federal counsel ('SFC') raised the following main issues which were also argued in the High Court;

(a) that pension adjustment is an 'additional benefit or assistance' and is therefore not in the nature of a 'pension right' that is envisaged under art 125(7) of the Federal Constitution;

(b) that the salary revision granted to judges on 1 July 2015 through PU (A) 59/2016 is not intended to apply to judges who had retired prior to that date; and

(c) if the Judges Remuneration (Amendment) Act 2014 (Act A1462) which provided the new formula of adjustment of pensions in the form of a flat two per cent annual increase is declared null and void, it follows that the subsidiary legislation, ie PU (A) 59/2016 that increased the substantive salary of serving judges on 1 July 2015 should likewise be nullified as it 'depends' on the validity of the said amending Act.

[17] I shall now deal with the above core issues together with the other related subsidiary issues.

Whether judges' pension is a right or an ex gratia payment?

[18] The main issue in this case is whether the change brought about by the judges Remuneration (Amendment) Act 2014 (Act A1462) to the formula to adjust judges' pension has infringed a constitutionally protected right. Learned SFC cited old cases to support the proposition that even the payment of pension to judges is not an absolute right. It follows that there is stronger force

in his argument that pension adjustment is only an 'additional benefit' or mere 'assistance'.

[19] I shall first consider the legal status of judges' pensions under the law before moving on to discuss whether the statutory formula to adjust it is a protected right as contended by the respondent or an 'additional benefit' or 'assistance' as contended by the learned SFC.

[20] Learned SFC said that pensions are not 'deferred remuneration' as there is 'zero contribution' from retired employees. He cited the old case of *Raja Mohktar bin Raja Yaacob v Public Trustee, Malaysia* [1970] 2 MLJ 151 where the court said that pensions are 'ex gratia payments' and are discretionary. In that case, the plaintiff who was a civil service officer sued for personal injuries that he suffered in a road accident that forced him to retire. It was argued that the pension he would receive from the government should be taken into account in assessing damages. This argument was rejected by Raja Azlan Shah (as His Majesty then was) at the High Court after considering eminent English cases on the subject. The passage on the nature of pensions that the learned SFC cited is as follows:

> In my judgment pension rights are *ex gratia* payments made to a government servant in respect of his past conduct and service out of the discretion of the Government and independent of the existence of any right of redress given to him against others.
>
> I am satisfied that the weight of authorities and public policy support my view that pensions are not to be brought into account in assessing damages at common law.

[21] Unlike in the above mentioned case, the nature of pensions was directly called into question in another case that was decided around the same time. In *Haji Wan Othman & Ors v Government of the Federation of Malaya* [1965] 2 MLJ 31, a group of government servants surrendered part of their pensions in exchange for gratuity. However, ten years later, some of them argued that they should be paid their full pensions as pensions cannot be reduced under the law. In dismissing their claim, Suffian J (as His Lordship then was) found that the prevailing legislation in question, ie the Pensions Ordinance 1951, used permissive language with respect to payment of pensions and therefore the relevant authority was not compelled 'to do this and that for the retired officer'. For the avoidance of doubt, Suffian J also noted that s 5 of the Ordinance expressly stated that there is no absolute right to pension. Section 5 reads as follows:

> (1) No officer shall have an absolute right to compensation for past services or to any pension, gratuity or other allowance under this Ordinance, nor shall anything in this Ordinance contained limit the right of the Federal

Government or, as the case may be, of the Government of any State to dismiss any officer without compensation.

(2) Where it is established to the satisfaction of the Yang di-Pertuan Agong that an officer has been guilty of negligence, irregularity, or misconduct, it shall be lawful for the Yang di-Pertuan Agong to reduce or altogether to withhold the pension, gratuity or other allowance for which such officer would have become eligible but for the provisions of this section.

[22] The learned High Court judge in the instant case considered the above cases and the argument of the learned SFC that judges' pensions are *ex gratia* payments but he rejected it. I would also reject the argument that present day judges' pensions are *ex gratia* payments. My reasons are as follows.

[23] On 3 September 1971, the JRA came into force. Until that date, judges' pensions were also provided in the Pensions Ordinance 1971. The long title of the JRA says that it is 'an Act to provide for the remuneration of judges and for the pensions and other benefits of their dependants, and for matters connected therewith'. In s 14 of the JRA, judges' pensions were decoupled from the Pensions Ordinance 1951 which continued to apply to civil service pensions until the Pensions Act 1980 (Act 227) came into force.

[24] As noted by the learned High Court judge, the JRA has without any qualification provided that a retired judge is 'entitled' to a pension. Section 3 states the right to a pension and s 4 provides the computation. These provisions employ the imperative 'shall'. They read as follows:

3. Pension and other benefits of Judge

A Judge *shall* on his retirement be *entitled* to a pension and other benefits in accordance with this Act. (Emphasis added.)

4. Computation and amount of pension of Judge

Subject to this Part, a Judge's pension shall be computed at the rate of 1/360 of his last drawn salary in respect of each completed month's service as a Judge:

Provided that in no case shall the pension so computed be more than 3/5 of his last drawn salary but without prejudice, however, to any adjustment of pension to his advantage that may be made in accordance with Part IIIA.

[25] It must be noted that the words of s 5 of the old Pensions Ordinance 1951 referred to in *Haji Wan Othman v Government of the Federation of Malaya* where it is stated that pension is not an 'absolute right' are repeated in s 3 of the Pensions Act 1980 which is applicable to civil servants. However, in the JRA, as I said earlier, the right to a pension is not qualified in any manner. There is no equivalent of s 3 of the Pensions Act 1980 or s 5 of the old Pensions Ordinance 1951 in the JRA. Thus, the argument of the learned SFC that

judges' pensions are an 'ex gratia' payment is untenable. In passing, with the greatest of respect, I would observe that even the qualifying words of s 3 of the Pensions Ordinance 1951 and s 5 of the Pensions Act 1980 do not suggest that pensions are mere ex gratia payments that can be whittled away for no good reason. What is meant by the above provisions is that pensions are not an 'absolute right' in the sense that they can be taken away for misconduct as stated in sub-s (2) of both provisions. In any event, as I noted earlier, insofar as judges' pensions are concerned, the right of a judge to a pension is not similarly qualified.

[26] For the above reasons, I hold that the pension paid to a retired judge as provided in the JRA, is a right and not an ex gratia payment. I shall now consider the nature of pension adjustment which is the main issue in this appeal.

Whether a 'right' or merely an 'additional assistance'?

[27] The answer to the question whether a statutorily prescribed mode of pension adjustment is a right or merely an 'additional benefit or assistance' would necessarily turn on the construction to be placed on 'pension rights' that is referred to in art 125(7) of the Federal Constitution. Article 125(7) which has been extended to Court of Appeal and High Court judges in cl (7) reads as follows.

> (7) The remuneration and other terms of office (including *pension rights*) of a judge of the Federal *Court shall not be altered to his disadvantage after his appointment*. (Emphasis added.)

[28] Before I consider this question, I shall first refer to the detailed arguments of the learned SFC as summarised below.

Hansard reports

[29] In his argument, the learned SFC again compared the issue of pension adjustment by way of analogy with that of civil servants. He referred to the Pensions Adjustment Act 1980 (Act 238) which applied to employees in the general public services. It came into force on 1 July 1980. Section 3 of the Act provided a schedule in which the formula for adjustment of civil service pensions referred to the current substantive salary of a serving officer. The learned SFC referred to Pensions Adjustment Act 1980 (Act 238) because when it was tabled in Parliament, the Minister said that instead of giving special additional pension payments on an *ad hoc* basis for the welfare of pensioners due to the rise in the cost of living, the government decided to streamline the said payments by pegging pension adjustment to the current salary of a serving officer. Part of the speech, taken from the Hansard and quoted by the learned

SFC is as follows:

> Kerajaan menyedari bahawa penyemakan secara ad hoc adalah tidak memuaskan, oleh yang demikian Kerajaan telah memutuskan supaya faedah pencen kepada semua pesara termasuklah orang-orang tanggungan mereka diselaraskan berdasarkan kepada tanggagaji semasa berikutan dengan gaji yang akan berkuatkuasa mulai 1hb Julai 1980. Dengan ini bermakna bahawa pencen yang dibayar kepada seseorang ini akan dikira semula berdasarkan gaji akhir yang sepatutnya diterima oleh seseorang kakitangan Kerajaan pada tarikh sebelum tamat perkhidmatannya dahulu seolah-olah beliau bersara di bawah tanggagaji baru yang akan dilaksanakan. (Debate for Act 238: Hansard, 18.06.1980 at 3033-3034).

[30] In other parts of the same speech which I will not reproduce, the Minister repeatedly referred to pension adjustment as a form of 'assistance' (*bantuan*) to pensioners. For this reason, the learned SFC argued that pension adjustment, being dependent on many factors including changes to the underlying salary scheme, is not a vested right but an additional 'assistance' to pensioners.

[31] The learned SFC then referred to the Minister's speech when tabling Judges' Remuneration (Amendment) Act 1984 (Act A609) that amended the JRA and introduced the Third and Fourth Schedules. Through The Judges' Remuneration (Amendment) Act 1984 (Act A609), judges' pensions were pegged to the salary of a serving judge. The Minister said that the purpose of the Judges' Remuneration (Amendment) Act 1984 (Act A609) was to maintain 'uniformity' between civil service pensions and judges' pensions with regard to the method of adjustment.

[32] Thus, the learned SFC said that when the civil service pensions were no longer linked to the current salary of a serving officer, judges' pensions should follow suit for the sake of 'uniformity'. In respect of civil service pensions, the Pensions Adjustment (Amendment) Act 2013 (Act A1447) came into force on 1 January 2013. It amended s 3 of the Pensions Adjustment Act 1980 (Act 238). This amending Act, very much like in the case of judges' pensions, removed the statutory formula that provided for an increment in civil service pensions by reference to the salary of a serving officer. In its place, it substituted a flat annual increment of two percent for civil service pensions. In his speech when tabling the amending law, the Minister said, among other things, that it was for the benefit of the civil service pensioners as it would streamline pension adjustment which would no longer be dependent on salary revision but would increase every year by two percent. Learned SFC submitted that the 'parity principle' would come into play as judges' pensions should likewise benefit from the annual two per cent increase. That is the reason for the removal of the old statutory formula enacted in 1984 that pegged judges' pensions to the salary of a serving judge.

[33] Thus, based on the speeches reported in the Hansard at various times when the law to adjust pensions was tabled, the learned SFC argued that the pension adjustment is not a vested right but an 'assistance' and that 'uniformity in policy' and 'parity' principles justified the impugned legislation.

[34] In my respectful opinion, the Hansard cannot be relied upon to determine whether the pension adjustment is a protected constitutional right or merely an additional benefit for the following reasons.

[35] The House of Lords, in the seminal case of *Pepper (Inspector of Taxes) v Hart and related appeals* [1993] 1 All ER 42, accepted reports of parliamentary debates as an aid to statutory construction. This well-known precedent was accepted in Malaysia by the Federal Court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345. Edgar Joseph Jr FCJ, quoting *Pepper v Hart*, observed that the Hansard may be used only as an aid to statutory construction where the written law is ambiguous or obscure or if literally construed might lead to an absurdity. However, His Lordship cautioned as follows:

> We hasten to add, however, that when resort to Hansard is permissible, that by itself although meriting serious consideration cannot be determinative of the issue since it is only available as an *aid* to interpretation. To hold otherwise, would amount to substituting the words of the Minister or other promoter of the Bill for the words of the statute, and that cannot be the law.

[36] Section 15B(1) which introduced the Third and Fourth schedules to the JRA in 1984 pegged the judges' pensions to the current salary of a serving judge as we saw earlier. There is absolutely no ambiguity about the wording of this provision. This provision in unequivocal terms granted a right to retired judges to expect an increment in their pensions whenever the salary of a serving judge was revised upwards. Section 15(1), in enacting the new formula in 1984, employed the imperative 'shall' twice when it stated that pensions '*shall* be adjusted in accordance with this Act and *shall* be paid or be payable with effect from the date of implementation of the current salary'.

[37] It also cannot be said that the literal meaning of the words of s 15B(1) leads to absurdity. By linking judges' pensions to the current salary of serving judges, s 15B(1) and the Third and Fourth Schedules unquestionably granted an advantage to judges in 1984. However, this was something that was envisaged from the outset in the JRA that was enacted in 1971. The proviso to s 4 of the JRA says that any adjustment to the pension of a judge 'to his advantage may be made' in accordance with Part IIIA. Section 4 reads as follows:

> Provided that in no case shall the pension so computed be more than 3/5 of his last

drawn salary but without prejudice, however, to any adjustment of pension to his advantage that *may* be made in accordance with Part IIIA. (Emphasis added.)

[38] Thus, when the respondent was appointed as a High Court judge in 1993, he immediately obtained an accrued right to the effect that his future pension would be revised upwards from time to time by being pegged to the current salary of a serving judge. The Minister may have used words such as 'assistance' when tabling Pensions Adjustment Act 1980 (Act 238) which is applicable to civil service pensions and subsequently words such as 'uniformity' and 'parity' when tabling Judges' Remuneration (Amendment) Act 1984 (Act A609) which is applicable to judges' pensions in 1984. Notwithstanding that, the said speeches cannot detract from the fact that the prevailing law vested a right on the respondent in respect of pension adjustment and not a mere discretionary benefit at the time he joined the judiciary.

Ambit of 'pension rights'

[39] Article 125(7) that I reproduced earlier says that the remuneration of a judge and 'other terms of office (including pension rights)' shall not be altered to his disadvantage after his appointment. It includes 'pension rights' which is stated in the plural. Thus, it is not limited to pension only. Since on the date of the respondent's appointment as a High Court judge, Judges' Remuneration (Amendment) Act 1984 (Act A609) had already amended the JRA to peg judges' pensions to the current salary of a serving judge and was the prevailing law, in my view, the mode of adjustment of pension is a protected 'pension right' that cannot be altered to his disadvantage by later law.

Whether impugned legislation disadvantageous?

[40] The respondent has undoubtedly proven that the impugned law, the (Judges Remuneration (Amendment) Act 2014 (Act A1462), is disadvantageous to his protected 'pension rights'. He would have received a monthly pension of RM14,795.82 instead of RM10,313.55 on 1 July 2015 when the salary of serving judges was increased vide PU (A) 59/2016 if not for the Judges Remuneration (Amendment) Act 2014 (Act A1462). Learned SFC argued that by virtue of the Judges Remuneration (Amendment) Act 2014 (Act A1462), retired judges received a two per cent increase in pensions regardless of salary revision and that having received it since 2014, there is no ground to complain now. In my view, that argument would only be correct if the law had not spelt out the nature of pension rights in the manner they did. At the risk of repetition, I shall again refer to the crucial provisions. Section 4 of the JRA provides for adjustment of pension. However, unfortunately for the argument of the learned SFC, only the adjustment of a retired judge's pension to his 'advantage' is envisaged and not otherwise. In fact, when Parliament enacted the impugned legislation, ie, the Judges Remuneration (Amendment) Act

2014 (Act A1462), it must have known that any change to the statutory formula in the now deleted Third and Fourth Schedules of the JRA could result in a disadvantage to judges who joined the judiciary before the date of its enactment, ie, 1 January 2014. This is the probable reason for the new s 15(B)(2) which reads as follows:

> Notwithstanding subsection (1), where the application of the specified rate of increment would result in a situation that is *less favourable to a Judge appointed before the coming into operation of this section*, the Yang di-Pertuan Agong *may*, by order in the *Gazette*, prescribe an appropriate higher percentage to be applied in such case. (Emphasis added.)

[41] However, the permissive 'may' is used in the above sub-section. I had earlier pointed out that the old s 15B used the imperative 'shall' twice when mandating the use of the Third and Fourth Schedules that pegged judges' pensions to the current salary of a serving judge. It is interesting to note that other provisions of the JRA also employ the imperative 'shall' when granting benefits to judges. Examples are s 3 (right to pension), s 4 (computation of pension), s 6 (pension guaranteed for life), section 7 (grant of gratuity) and s 7A (period of service as judicial commissioner counted as part of service as a judge). In the premises, the new s 15B(2), while acknowledging that the annual flat rate pension increment of two per cent may be detrimental to judges who joined the Judiciary earlier, it did not grant any automatic right of remedy because it used the permissive 'may'. It was left at the discretion of the government to remedy the disadvantage. It is common ground that since the passing of Judges Remuneration (Amendment) Act 2014 (Act A1462), retired judges who joined the judiciary before the said law came into force were not given any special adjustment of their pensions in accordance with s 15B(2) of the JRA.

[42] In passing, I would observe that if the imperative 'shall' had been used in the new s 15B(2), the question of infringement of art 125(7) of the Federal Constitution would not have arisen. Retired judges who joined the judiciary before 1 January 2014 would have had their pensions adjusted automatically in accordance with the old formula after PU (A) 59/2016 that increased salaries of serving judges was enacted.

[43] For the foregoing reasons, I am of the opinion that the Judges Remuneration (Amendment) Act 2014 (Act A1462) that removed a pension right, ie the prevailing mode of adjustment of pension when the respondent joined the judiciary, is clearly disadvantageous within the meaning of art 125(7) read with cl (9) of the Federal Constitution.

Whether PU (A) 59/2016 applies to judges' pensions?

[44] I noted earlier that the salary of serving judges was increased with effect from 1 July 2015 by the government and the decision was published in the gazette as PU (A) 59/2016. Learned SFC referred to extraneous material such as Minister's speech in Parliament, Debate Notes, letters written to the Judicial Appointment Commission (JAC) and briefings given to the latter and argued that PU (A) 59/2016 was not 'intended' to apply to retired judges. He submitted that the increment was granted to attract talent, especially talent from the private sector to join the judiciary. He also pointed out that the JAC did not object to the flat rate increase of two per cent in judges' pensions in the first place. However, it must be pointed out there is no evidence of assent on the part of the JAC either. The relevant letter only says that the proposal to increase judges' pensions by a flat two per cent rate was noted (*diambil maklum*) by the JAC.

[45] It may well have been the intention of PU (A) 59/2016 that the increment in salaries was aimed at attracting private sector talent as submitted by the learned SFC. However, the learned SFC also said that it is not meant to apply to judges' pensions. If that is the case, amendments to the law including art 125(7) of the Federal Constitution should have been made to enable it. Since, the removal of the Third and Fourth schedules in the JRA is unconstitutional, PU (A) 59/2016 would also apply to the pensions of judges who joined the judiciary before 1 July 2015 in accordance with the old s 15B(1) of the JRA. Otherwise, a constitutionally protected and accrued right of retired judges would have been infringed. Thus, with respect, I find the argument of the learned SFC which is based on the presumed intention of PU (A) 59/2016 to be unhelpful.

Federal Court decision in Aminah's case

[46] In *The Government of Malaysia & Anor v Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public service)* [2023] 5 MLJ 32; [2023] 8 CLJ 1, a similar challenge was mounted by Aminah Ahmad who is a retired civil servant against the Pensions Adjustment (Amendment) Act 2013 (Act A1447). As I noted earlier, this Act substituted a flat two per cent annual increment in civil service pensions in place of the old formula that pegged civil service pensions to the current salary of a serving officer. Article 147(1) of the Federal Constitution that protects pension rights of civil servants reads as follows:

> 147 Protection of pension rights
>
> (1) The law applicable to any pension, gratuity or other like allowance (in this Article referred to as an 'award') granted to a member of any of the public services, or to his widow, children, dependant or personal representatives, shall be that in force on the relevant day or any later law *not less favourable to the person to whom the award is made.* (Emphasis added.)

[47] In the case of *Aminah bt Ahmad*, unlike in the case of retired judges who did not benefit from PU (A) 59/2016, a less favourable situation had not arisen as the salary of civil servants had not been increased since Pensions Adjustment (Amendment) Act 2013 came into force on 1 January 2013. Apart from arguing that a 'less favourable' situation had not arisen, the learned SFC also canvassed the following points as noted in para [14] of the judgment of the Federal Court:

(a) pensions adjustment provided under Act 238 is not a right protected under art 147(1) Federal Constitution;

(b) the COA had applied wrongly the 'not less favourable' test in art 147(1) of the Federal Constitution; and

(c) Act 238 and Act A1447 served a legitimate purpose and are proportionate responses to a justifiable exception.

[48] None of the above points, which incidentally were also canvassed before us, found favour with the Federal Court. Instead the Federal Court found the issue as framed by Darryl Goon Soon Chye JCA at the Court of Appeal to be determinative. It is as follows:

> However, we are not here concerned with a claim to an entitlement to pension not granted. The issue at hand is a narrow one. It is whether the amendments to ss 3 and 6 of the PAA 1980 contravenes art 147 of the Federal Constitution. It is whether the law applicable to pensions granted to members of the public services has somehow been rendered less favourable.

[49] The Federal Court approached the issue on the footing that a less favourable situation could potentially arise for civil servants because of Pensions Adjustment (Amendment) Act 2013 (Act A1447) although no actual loss was suffered by Aminah Ahmad as the salary of civil servants had not been revised upwards. The Federal Court also quoted with approval the observation of the Court of Appeal that s 3(2) of the Pensions Adjustment (Amendment) Act 2013, which provides the remedy if a less favourable situation should arise for civil servants who joined service before 1 January 2013, uses the permissive 'may'. This provision is similar to the new s 15B(2) of the JRA that applies to judges' pensions. It reads as follows:

> (2) Notwithstanding subsection (1), where the application of the specified rate of increment would result in a situation that is less favourable to an officer appointed before the coming into force of this section, the Yang di-Pertuan Agong may by order in the *Gazette* prescribe an appropriate higher percentage of increment to be applied in such case. (Emphasis added.)

[50] The Federal Court concluded in para 42 of its judgment as follows:

> [42] After careful reading of the amended sections, we with respect, are in

agreement with the COA that with the word 'may', being used as the mechanism built into s 3(2) to address a less favourable situation, should it arise, is merely permissive. *The amended s 3(2) of the PAA 1980 does not ensure that art 147 of the Federal Constitution is not contravened.* (Emphasis added.)

[51] In the result, the Federal Court dismissed the appeal and affirmed the decision of the Court of Appeal that declared the provisions of the Pensions Adjustment (Amendment) Act 2013 (Act A1447) which amended the Pensions Adjustment Act 1980 (Act 238) to remove the old formula to be null and void.

[52] The critical words in art 125(7) that applies to judges are 'shall not be altered to his disadvantage' whereas in art 147 which applies to civil servants, the critical words are 'later law no less favourable'. Reading both provisions holistically, I see no difference in the plain meaning of these provisions although they are not identically worded. They are meant to protect pension rights from detrimental changes in later law. Thus, the issue in this case and the *Aminah bt Ahmad*'s case essentially turns on the breadth of the protection of pension rights granted by the Federal Constitution. For this reason, I am of the opinion that the doctrine of stare decisis applies and that the Federal Court's decision in the *Aminah bt Ahmad*'s case binds this court. As the Federal Court held that the removal of the old formula that tied pensions to the current salary infringed constitutionally protected pension rights, I am bound to rule similarly.

Whether PU (A) 59/2016 nullified if Act A1462 held to be void?

[53] Learned SFC also argued that if the Judges Remuneration (Amendment) Act 2014 (Act A1462) is held to be null and void it follows that PU (A) 59/2016 which increased the salary of judges with effect from 1 July 2015 should be also be voided. I find this argument difficult to accept. PU (A) 59/2016 was not made under the authority of the amending law, ie the Judges Remuneration (Amendment) Act 2014 (Act A1462) but rather under the principal law governing judges remuneration and pensions which is the JRA. Salaries of judges are provided under the First Schedule of the JRA. And s 19 of the JRA reads as follows:

(1) The Yang di-Pertuan Agong may, after consultation with the Chief Justice, make regulations for the purpose of carrying into effect any of the provisions of this Act.

(2) Regulations made under subsection (1) *may amend or vary the provisions of the First, Second and Fifth Schedules.* (Emphasis added.)

[54] The preamble to PU (A) 59/2016 reads as follows:

> *In exercise of the powers conferred by* section 19 of the Judges' Remuneration Act 1971 [*Act 45*], the Yang di-Pertuan Agong, after consultation with the Chief Justice, makes the following regulations. (Emphasis added.)

[55] In the premises, the argument that PU (A) 59/2016 would be voided is without merit.

Cross-appeal of respondent

[56] As I said earlier, in granting relief to the respondent as per the Table exhibited in the affidavits, the learned High Court judge ordered that the amount representing the two per cent increment in the pensions since 2015 should be deducted from the 'short paid' amount. The respondent pointed out that the learned High Court judge erred in making this order as the two per cent increment in the pensions of the affected judges had already been taken into account and deducted in the calculation of the total 'short paid' amount. Learned SFC did not disagree with this submission.

CONCLUSION

[57] For all the above reasons, I am not persuaded that the appeal has merit. The appeal is dismissed. The cross-appeal of the respondent and the named judges is allowed to the extent that the sum representing the two per cent increment in pensions, as shown in the respective tables exhibited in the affidavits, is not to be deducted as conceded by the learned SFC. However, we will not vary the judgment of the High Court in the same manner (deduction of two per cent already paid) in respect of the amounts due to the unnamed judges since the respondent is not pursuing that before us. Otherwise, the unnamed judges whom the plaintiff represents, are also entitled to the same adjustment to their pensions or derivative pensions based on the old formula before the impugned law came into force as ordered by the High Court.

[58] My learned sister, Justice Azimah bt Omar JCA has read this judgment in draft and has expressed her agreement with it whereas Justice Lim Chong Fong has dissented and has written a separate judgment. Lastly, there will be no order as to costs.

Lim Chong Fong JCA (delivering dissenting judgment of the court):

INTRODUCTION

[59] This is an appeal concerning judges' pension and derivative pension payable pursuant to the Judges' Remuneration (Amendment) Act 2014 ('Act A1462').

[60] We heard the appeal on 9 November 2023 and 18 April 2024.

[61] Thereafter, it is clear that my learned brother, Justice Ravinthran N Paramaguru JCA and learned sister, Justice Azimah bt Omar JCA are minded to dismiss the appeal. I am however, with respect, unable to concur with them and hence, am constrained to deliver this dissenting judgment to expound my reasons thereto.

BACKGROUND

[62] The undisputed background facts have been set out by the learned High Court judge in paras [3] to [15] of the grounds of judgment as reported in *Ian Chin Hon Chong (for himself and on behalf of all the affected judges who were appointed to the High Court in Sabah and Sarawak before 1 July 2015 and receiving their pensions and on behalf of all persons who are receiving their derivative pensions on account of the death of such judges) v The Government of Malaysia & Anor* [2023] 11 MLJ 821; [2023] 4 CLJ 198 and are accordingly reproduced as follows:

> [3] The plaintiff Ian Chin Hon Chong is suing on his own behalf.
>
> [4] He is also suing on behalf of all the retired judges of the High Court of Sabah and Sarawak who were appointed judges before 1 July 2015 and receiving their pensions and on behalf of all persons who are receiving their derivative pensions under the Judges' Remuneration Act 1971 (Act 45) and who are not otherwise parties in any similar action in the High Court in Malaya.
>
> [5] The plaintiff Ian Chin Hon Chong ('the plaintiff') was appointed a judicial commissioner on 1 March 1992 and a judge of the High Court on 20 August 1993. He retired on 1 December 2008 after serving for 201 months (that is 16 years and nine months) entitling him to a full pension under the then existing law.
>
> [6] (i) By 1 June 2012 the plaintiff's pension was under the then existing law computed at the rate of '1/360 of his last drawn salary in respect of each completed month's service as a judge: Provided that in no case shall the pension so computed be more than 3/5 of his last drawn salary but without prejudice, however, to any adjustment of pension to his advantage that may be in accordance with Part IIIA' (the old formula).
>
> (ii) The then existing Part IIIA, s 15B(1) provides for an adjustment upward based on the 'corresponding last drawn salary'.
>
> (iii) The term 'corresponding last drawn salary' is defined to mean 'in the case of a judge to whom any of the current salaries does not apply by virtue of his having retired or died prior to the implementation and had the appropriate current salary been applied to his case;' (see s 1A, Judges' Remuneration Act 1971 (Act 45)).
>
> [7] The plaintiff's pension had hitherto 1 July 2015 always been computed in the manner described in para 6 based on the upward changing salary scale of serving judges. The old s 15B of Act 45 provides as follows:

15B(1) Subject to Part III and this Part, pensions and other benefits granted to Judges and their dependants under that Part before or on the implementation of any current salary shall be adjusted in accordance with this Act and shall be paid or be payable with effect from the date of implementation of the current salary.

(2) The pension of a Judge granted under Part III shall be adjusted as provided in the Third Schedule.

(3) Any derivative pension granted under Part III shall be adjusted as provided in the Fourth Schedule.

(4) Any disability pension or dependant's pension granted under Part III shall be adjusted based on the Judge's corresponding last drawn salary but the factor applicable shall be the factor under that Part.

(5) In the event of any doubt in the determination of the corresponding last drawn salary of:

(a) a Judge of a High Court;

(b) a Judge of the Federal Court or of the Court of Appeal or a President or a Chief Judge; or

(c) a Chief Justice,

the corresponding last drawn salary in each case shall be determined respectively by:

(i) the Chief Judge of the High Court concerned;

(ii) the Chief Justice; or

(iii) the Yang di-Pertuan Agong.

The old Third Schedule and Fourth Schedule of Act 45 provides

...

The new s 15B of Act 45 provides:

...

[8] This plaintiff pension rights of the plaintiff is protected by art 125(7) (read with art 125(9) of the Federal Constitution) which states:

125(7) The remuneration and other terms of office (including pension rights) of a judge of the Federal Court shall not be altered to his disadvantage after his appointment.

(Article 125(7) was extended by art. 125(9) to include High Court Judges).

[9] The plaintiff contends that the defendants caused to be passed the Judges' Remuneration (Amendment) Act 2014 (Act A1462) which altered to the plaintiff's disadvantage the pension payable to the plaintiff as illustrated and elaborated in the following Table 1 and Table 2 of encl. 2. Table 1 is set out below as follows:

[10] The computation and the amount that the plaintiff was disadvantaged as set

out in Table 1 is not disputed by the defendant. The Judges' Remuneration (Amendment) Act 2014 (Act A1462) abolished the previous formula for computation of the pension based on the current salary of a judge and instead allow a flat rate increase of 2%. As a result, even though the judge's salary was increased to RM26,500 under the Judges' Remuneration (Amendment of First and Fifth Schedules) Regulations 2016 (PU(A) 59/2016) with effect from 1 July 2015, the pension was not adjusted according to that new salary.

[11] By 1 June 2012 the plaintiff's pension was under the law computed at the rate 1/360 of a judge prevailing salary x 201 (months of completed service) but shall not be more than 3/5 of the said salary. From 1 July 2015, the computation should be 1/360 of RM26,500 x 201 months = RM14,795.83 which is not more than 3/5 of the 26,500 salary.

[12] The plaintiff contends that the said retired judges and derivative pension holders referred to in para 4 above, whom the plaintiff represents suffer similar disadvantages and infringement of their rights as those suffered by the plaintiff.

[13] The particulars of the disadvantages suffered by the late Charles Ho Nyen Chung since 1 July 2015 amounting to RM269,603.04 are set out in para 5 and Table A of the affidavit of Christopher Ho Ming Ken (encl 7) who is the executor of the estate of the Charles Ho Nyen Cheung, deceased.

[14] The computation and amount of derivative pension short paid to Catherine Lee, widow of the late Charles Ho Nyen Cheung from Nov 2020 to Feb 2022 amounting to RM54,686.86 is stated in para 2 of the affidavits of Catherine Lee (encl 6).

[15] The computation and amount of derivative pension short paid to Ten Yaw Hee, widow of the late Chong Siew Fai (retired Chief Judge of the High Court of Sabah and Sarawak) for the period from July 2015 to May 2022 amounting to RM222,529.11 is set out in para 5 and Table 1 marked TYH1 of the affidavit of Ten Yaw Hee (encl 26). The defendants did not dispute the computation and the amount of short paid pension in the affidavit of Christopher Ho Ming Ken, affidavit of Catherine Lee and the affidavit of Ten Yaw Hee.

[63] The learned High Court judge found for the respondents as follows in the grounds of judgment:

[72] In the final analysis, the undisputed facts set out in paras 9–15 above shows that the pension rights of the plaintiff and those whom he represents have been altered to their disadvantage by Act A1462. The disadvantage is not negligible but very substantial as shown in Table 1 which is reproduced in para. 9 above. The facts, computation and figures stated in Table 1 are undisputed. The automatic right to an adjustment under the repealed law is replaced with a fixed annual adjustment of 2% and any further adjustment to address the unfavourable rate of increment is at the pleasure of the Yang di-Pertuan Agong. To date, no adjustment was made by the King to address the unfavourable increment rate.

[73] Applying a broad interpretation of art 125(7) read with art 125(9) of the Federal Constitution as enunciated by the appellate courts in Dato' Menteri

Othman, CCH and Aminah above to the present case, this court finds that pension adjustment is an integral part of pension rights which is protected under art 125(7) read with art 125(9) of the Federal Constitution. The less favourable situation and disadvantageous alteration created by Act A1462 is inconsistent with the pension rights of the plaintiff and those whom he represents as enshrined in said articles. In the premises and to the extent of the inconsistency, Act A1462 is void for being inconsistent with art 125(7) read with art 125(9) of the Federal Constitution.

[74] The plaintiff and the estate of the named affected judges represented by him (the late Charles Ho Nyen Cheung and the late Chong Siew Fai) have adduced unchallenged evidence in para 6 and Table 1 marked TC (1) of encl 2, para 5 of encl 7, para 3 of encl 6 and para 11 and Table 1 (TYH1) of encl 26 to prove that they have suffered loss due to the disadvantageous alteration of their pension or derivative pension rights. The computation and amount of the short fall from the pensions or derivative pensions paid to the named judges or their widows or executor which are asserted in the aforementioned affidavits are undisputed by the defendants. Hence, the plaintiff and the estate of the named affected judges have proven that they have suffered loss and damages in consequence of the disadvantageous alteration on a balance of probabilities. In the premises, the court has power to mould the remedy or relief to suit the justice of the case. See *R Rama Chandran v Industrial Court Of Malaysia & Anor* [1997] 1 MLJ 145; [1997] 1 CLJ 147 (FC) and *Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor* [2022] 4 MLJ 74; [2022] 2 CLJ 726 (CA).

[64] The appellants thus appealed and the respondents consequently cross-appealed to the Court of Appeal.

APPELLANTS' POSITION

[65] The appellants, inter alia, contended that Act A1462 which amended the Judges Remuneration Act 1971 ('Act 45') is not unconstitutional violating a 125(7) of the Federal Constitution.

[66] Furthermore, according to the appellants, the provisions in Act A1462 are in parity to the amendments made in the Pensions Adjustment (Amendment) Act 2013 to the Pensions Act 1980 that governs public servants.

[67] The appellants also contended that the salary revision vide Judges' Remuneration (Amendment of First and Fifth Schedules) Regulations 2016 ('PU(A) 59/2016') is not meant to apply to judges who had retired before coming into effect the salary revision on 1 July 2015 pursuant to PU(A) 59/2016.

RESPONDENTS' POSITION

[68] The respondents however contended that the amended provision in Act 45 as the result of Act A1462 is unconstitutional for having violated art 125(7) of the Federal Constitution, analogous to the amendments introduced by the Pensions Adjustment (Amendment) Act 2013 that violated art 147 of the Federal Constitution as interpreted in *Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public services) v The Government of Malaysia & Anor* [2022] 4 MLJ 74; [2022] 2 CLJ 726 (CA) and *The Government of Malaysia & Anor v Aminah bt Ahmad (suing in her personal capacity and on behalf of 56 retired members of the public service)* [2023] 5 MLJ 32; [2023] 8 CLJ 1 (FC) ('collectively *Aminah bt Ahmad* cases') in respect of public servants' pension. It is hence void following art 4(1) of the Federal Constitution as found by the learned High Court judge.

MY FINDINGS

[69] As lucidly put by the appellants before us, the heart of the contention in the High Court revolved on whether Act A1462 is void for being inconsistent with art 125(7) read with article 125(9) of the Federal Constitution.

[70] It is provided as follows in arts 125(6), (7) and (9) of the Federal Constitution:

> 125. Tenure of office and remuneration of judges of Federal Court
>
> ...
>
> (6) Parliament shall by law provide for the remuneration of the judges of the Federal Court, and the remuneration so provided shall be charged on the Consolidated Fund.
>
> ...
>
> (7) The remuneration and other terms of office (including pension rights) of a judge of the Federal Court shall not be altered to his disadvantage after his appointment.
>
> ...
>
> (9) This Article shall apply to a judge of the Court of Appeal and to a judge of a High Court as it applies to a judge of the Federal Court, except that the Yang di-Pertuan Agong before suspending under Clause (5) a judge of the Court of Appeal or a judge of a High Court other than the President of the Court of Appeal or the Chief Judge of a High Court shall consult the President of the Court of Appeal or the Chief Judge of that High Court instead of the Chief Justice of the Federal Court.

[71] The remuneration and pension entitlement of a judge (including derivative pension) was originally governed by Act 45 but that was subsequently amended by the Judges' Remuneration Amendment Act 1984

(Act A609). The amendments included, amongst others, that pension (including derivative pension) is adjusted on a formula based on the current salary of a serving judge. It follows that the computation of pension of a retired judge will be adjusted as and when the salary for judges in the First Schedule of Act 45 is adjusted.

[72] However, by Act A1462, the amendment changed the pension entitlement of a judge (including derivative pension) be adjusted based on the salary of the judge as at 1 January 2014 subject to a flat 2% annual increment instead of a formula based on the current salary of a serving judge.

[73] The amended provision in Act 45 here consequential to Act A1462 are as follows:

> 15B Adjustments of pensions and other benefits of Judges and dependants.
>
> (1) Subject to Part III and this Part, pensions and other benefits granted to Judges and their dependants under this Act shall be adjusted annually by an increment of two percent in accordance with the provisions of this Act and shall be paid or be payable with effect from January of each year.
>
> (2) Notwithstanding subsection (1), where the application of the specified rate of increment would result in a situation that is less favourable to a Judge appointed before the coming into operation of this section, the Yang di-Pertuan Agong may, by order in the Gazette, prescribe an appropriate higher percentage to be applied in such case.
>
> (3) For the purpose of an order under subsection (2), the Yang di-Pertuan Agong may prescribe:
>
> (a) different percentages of increment for different categories of recipients; and
>
> (b) that the higher percentage of increment shall only apply for a specified year or any part thereof, and in such case, the date on which the adjustment shall be payable.
>
> (4) Any derivative pension granted under Part III shall be adjusted in accordance with subsection (1).
>
> (5) Any disability pension or dependant's pension granted under Part III shall be adjusted in accordance with subsection (1) but the factor applicable shall be the factor applicable under that Part.
>
> (6) Where the factor referred to in subsection (5) changes according to the eligibility of the dependant as specified under that Part, the dependant's pension shall be adjusted based on the notional salary as determined under subsection (7) using the new factor applicable under that Part.
>
> (7) The notional salary:

(a) in the case of a dependant who received the dependant's pension before or on 1 January 2014, shall be the amount of the corresponding last drawn salary received by a Judge on 1 January 2014 which has been calculated with an increment of two percent annually up to the year when the factor changes; or

(b) in the case of a dependant who received the dependant's pension on or after 2 January 2014, shall be the amount of the last drawn salary received by a Judge on the date of his death which has been calculated with an increment of two percent annually up to the year when the factor changes.

(8) Where a higher percentage of increment has been prescribed under subsection (2), the increment specified under subsections (3), (4) and (5) shall be calculated using that prescribed higher percentage.

(9) The amount of dependant's pension adjusted under subsection (6) shall be used as the basis for adjustments under subsection (5) in subsequent years. For the purpose of this section, 'corresponding last drawn salary' means the corresponding last drawn salary which had been adjusted on 1 January 2014 pursuant to this Act before the coming into operation of this section.

[74] First and foremost, I am in concurrence with the majority that pension adjustment is a right and not an additional benefit. Albeit the respondents have significantly relied on the *Aminah bt Ahmad* cases including the learned High Court judge on the *Aminah bt Ahmad* case in the Court of Appeal then available, it is, with respect, my view that this court is not bound by them by virtue of stare decisis because the *Aminah bt Ahmad* cases dealt with art 147 of the Federal Constitution which applies only to public servants. Furthermore, the relevant wordings and provisions in art 125 and art 147 of the Federal Constitution are not identical. There is also art 147(3) of the Federal Constitution on options available to the pensioners which is absent in art 125 of the Federal Constitution. The Aminah bt Ahmad cases are in my view, at best persuasive by reason of the similar provision in the Pensions Adjustment (Amendment) Act 2013 and in Act A1462.

[75] More pertinently in the *Aminah bt Ahmad* cases, I observed that the Pensions Adjustment (Amendment) Act 2013 was struck down because there exists a risk or mere possibility that a less favourable situation might arise in the context of art 147(1) of the Federal Constitution. There is, in other words, no necessity for the pensioner having to prove actual loss to demonstrate that a less favourable outcome occasioned.

[76] The interpretation of the relevant laws was made in vacuo devoid of facts or evidence in the *Aminah bt Ahmad* cases. Reliance and justification were made therein on the Indian Supreme Court case of *Chintaman Rao v the State of Madhya Pradesh* 1950 SCR 759 where Mahajan J held as follows:

> The law even to the extent that it could be said to authorize the imposition of restrictions in regard to agricultural labour cannot be held valid because the language employed is wide enough to cover restrictions both within and without the limits of constitutionally permissible legislative action affecting the right. So long as the possibility of its being applied for purposes not sanctioned by the Constitution cannot be ruled out, it must be held to be wholly void.

[77] Again, with respect, I am however of the view that legal decision making particularly in the situation where a person is allegedly disadvantaged cannot and must not operate in a vacuum because justice must ultimately be done based on the circumstances of the case. Deciding including constitutional interpretation based merely on hypothetical factual risk and possibility is unsatisfactory. I draw support from the Canadian Supreme Court case of *MacKay v Manitoba* [1989] 2 SCR 357 where Cory J stated as follows:

> Charter decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialise the Charter and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of Charter issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. Charter decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[78] Furthermore, I noted in the analogous European Court of Human Rights case of *Khoniakina v Georgia* (App No 17767/08) [2012] ECHR 17767/08, it was held that amendments made to the Georgia Supreme Court Act where retired judges' pension that was previously adjustable in the salary scale of serving judges and replaced with a fixed sum is lawful and justified because the amendment pursued a legitimate aim in the public interest as well as reasonably proportionate to the purpose sought to be achieved.

[79] In the premises, I find and hold that Act A1462 cannot be simply struck down or declared void for violating art 125(7) read with art 125(9) of the Federal Constitution per se based on the existence of a hypothetical risk or mere possibility of disadvantage to the pensioner.

[80] Be that as it may, the respondents here have established that actual loss had been suffered when the increase in salary of judges *vide* PU(A) 59/2016 was not computed and adjusted in the respondents' pension and derivative pension respectively by reason of the amended Act 45 by virtue of Act A1462. Hence, retired Justice Ian Chin Hong Chong lost out in pension amounting to RM301,768.60. Additionally, the widow of the late retired Justice Charles Ho Ming Ken lost out in derivative pension amounting to RM269,603.04 and the widow of the late retired Justice Chong Siew Fai lost out in derivative pension amounting to RM222,529.11 respectively. The actual loss is the nett difference

between the amount of pension and derivative pension received by the respondents from July 2015 to February 2022 computed based on Act 45 (and the subsequent amendment as introduced by Act A1462) and the amount that would have been received by the respondents computed based on Act 45 (and the salary revision as introduced by PU(A) 59/2016 but disregarding Act A1462).

[81] It is not in dispute that the purpose of Act A1462 is to adjust the retired judge's pension solely for the purpose of Malaysian economic inflation annually at the fixed rate of 2% subject to a permissive adjustment by the Yang di-Pertuan Agong acting in consultation with the executive arm of the Government of Malaysia if the fixed rate is proven disadvantageous, say not in commensuration with the actual Malaysian economic inflation rate. This new formula of pension adjustment in principle is in parity with the pension adjustment applicable to all public servants. This is fair, see the Canadian cases of *Provincial Court Judges' Assn of New Brunswick v New Brunswick (Minister of Justice); Ontario Judges' Assn v Ontario (Management Board); Bodner v Alberta; Conférence des juges du Québec v Quebec (Attorney General); Minc v Quebec (Attorney General)* [2005] 2 SCR 286 and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island R v Campbell; R v Ekmecic; R v Wickman Manitoba Provincial Judges Assn v Manitoba (Minister of Justice)* [1997] 3 SCR 3.

[82] As a matter of fact, there was no judge's salary adjustment based on the old formula in Act 45 since the retirement of the respondents until the gazetting of PU(A) 59/2016. It follows therefore, without the introduction of the Act A1462, the retired judges including the respondents who received pension and derivative pension would not be compensated for the yearly economic inflation until the next salary adjustment is made. However, the timing of the subsequent salary adjustment has always been at large at the discretion of the executive arm of the Government of Malaysia. Seen in this light, it can be surmised that Act A1462 has been advantageous rather than disadvantageous to the respondents.

[83] In respect of the PU(A) 59/2016 which has been made pursuant to s 19 of Act 45, it is plain and not in dispute that the purpose is to attract suitably qualified law practitioners from the private practice to apply for judicial office. This has already been contemplated during the parliamentary debate on 9 April 2014 in the course of the enactment of Act A1462 as evidenced in Hansard as follows:

> Seterusnya isu kenaikan gaji hakim dan gaji bebas cukai. Beberapa Ahli Yang Berhormat juga, Tuan Yang di-Pertua, telah mengemukakan perkara ini dan ingin mengetahui sama ada kerajaan bersedia untuk menaikkan gaji dan faedah-faedah

> lain bagi hakim-hakim di negara ini setanding dengan negara-negara serantau ... pindaan terahkir kepada perubahan gaji dan elaun-elaun keraian, elaun khas kehakiman, imbuhan tetap perumahan dan elaun pembantu rumah bagi hakim-hakim mahkamah atasan telah dilaksanakan pada 1 Januari 2009. Namun begitu satu jawatankuasa khas telah ditubuhkan untuk menyemak semula gaji dan menambah baik skim perkhidmatan hakim mahkamah atasan untuk lebih kompetitif bagi menarik pengamal undang-undang yang berkaliber menyertai badan kehakiman. Cadangan jawatankuasa itu kelak akan dibawa untuk pertimbangan kerajaan.

Thereafter, the executive arm of the Government of Malaysia implemented the same in PU(A) 59/2016 with effect from 1 July 2015 after due consultation with the Judicial Appointments Commission based on the Chief Justice's memorandum dated 27 April 2015. It was made clear that this salary revision in salary would not be applicable to judges who retired before 1 July 2015 by reason of financial burden and implication to the Government of Malaysia.

[84] In this regard, it cannot thus be denied that there is close interconnection between Act 45, Act A1462 and PU(A) 59/2016 which must necessarily be read together harmoniously.

[85] The respondents here have mathematically demonstrated that Act A1462 resulted in actual financial loss; hence disadvantageous to them because their pension has only been paid based on the judge's last drawn salary plus the 2% annual increase thereon in lieu of pension adjustment based on the revised salary brought about by PU(A) 59/2016 according to the repealed old formula. According to the respondents which is accepted by the learned High Court judge, Act A1462 when read and applied together with PU(A) 59/2016 is therefore unconstitutional and void for violating art 125(7) read with art 125(9) of the Federal Constitution.

[86] This is however a fallacy in my view because it is not in dispute that art 125(7) read with art 125(9) as well as the related statutes Act 45, Act A1462 and PU(A) 59/2016 are nonetheless subject to art 8 of the Federal Constitution.

[87] Article 8 of the Federal Constitution provides for discrimination between persons if there is reasonable classification founded on intelligible differentia having a rational relation or nexus with the policy or object sought to be achieved by the statute or statutory provision in question, see *Public Prosecutor v Datuk Harun bin Haji Idris & Ors* [1976] 2 MLJ 116; [1976] CLJU 180 (HC).

[88] In *Alma Nudo Atenza v Public Prosecutor and another appeal* [2019] 4

MLJ 1; [2019] 5 CLJ 780 (FC), Richard Malanjum CJ held as follows:

Article 8 And The Doctrine Of Proportionality

[117] When interpreting other provisions in the FC, the courts must do so in light of the humanising and all-pervading provision of art 8(1) (see: *Dr Mohd Nasir Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213; [2007] 1 CLJ 19 at para [8], approved in *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 2 MLJ 285; [2008] 1 CLJ 521 at para [86]; *Lee Kwan Woh* at para [12]). Article 8(1) guarantees fairness in all forms of State action (see: *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; [1996] 2 CLJ 771). The essence of the article was aptly summarised in *Lee Kwan Woh* at para [12]:

> The effect of art 8(1) is to ensure that legislative, administrative and judicial action is objectively fair. It also houses within it the doctrine of proportionality which is the test to be used when determining whether any form of state action (executive, legislative or judicial) is arbitrary or excessive when it is asserted that a fundamental right is alleged to have been infringed.

[118] In other words, art 8(1) imports the principle of substantive proportionality. 'Not only must the legislative or executive response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved' (see: *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* at para [8]. The doctrine of proportionality housed in art. 8(1) was lucidly articulated in *Sivarasa Rasiah* at para. [30]:

> ... all forms of state action — whether legislative or executive — that infringe a fundamental right must (a) have an objective that is sufficiently important to justify limiting the right in question; (b) the measures designed by the relevant state action to meet its objective must have a rational nexus with that objective; and (c) the means used by the relevant state action to infringe the right asserted must be proportionate to the object it seeks to achieve.

[119] Accordingly, when any State action is challenged as violating a fundamental right, such as the right to life or personal liberty under art 5(1), art 8(1) will at once be engaged such that the action must meet the test of proportionality. This is the point at which arts 5(1) and 8(1) interact (see: *Sivarasa Rasiah* at paras [17]–[19]).

[120] This approach is consistent with that adopted in other Commonwealth jurisdictions. Proportionality is an essential requirement of any legitimate limitation of an entrenched right. Proportionality calls for the balancing of different interests. In the balancing process, the relevant considerations include the nature of the right, the purpose for which the right is limited, the extent and efficacy of the limitation, and whether the desired end could reasonably be achieved through other means less damaging to the right in question (see: *State v Makwanyane* [1995] 1 LRC 269 at p 316).

[89] It is clear to me that the object or purpose of Act A1462 and PU(A) 59/2016 is distinct and different. The former addresses economic inflation whilst the latter targets attraction of talent into the judiciary. That aside, the category of the persons affected is easily discernible too, to wit, Act A1462

applied to current and future retired judges and PU(A) 59/2016 applied to serving judges.

[90] I am therefore satisfied there is proper, proportionate and reasonable differentiation to discriminate against the respondents by excluding them from the benefit conferred by PU(A) 59/2016. It is worthwhile noting that in *Government of Malaysia v VR Menon* [1990] 1 MLJ 277 (SC) which also concerned a judge's pension, Mohamed Azmi SCJ held as follows:

> The object of the Act is not to give additional benefits, pure and simple, to pensioners. The object is to ameliorate the financial position of pensioners in Malaysia due to the depreciating value of the ringgit, and the rise in cost of living allowance in Malaysia. Although it may be reasonable to assume that inflation is a common factor everywhere, it would be arbitrary to conclude not only that the rate of depreciation in value of the Malaysian ringgit is the same as all foreign currencies, but also that the rate of inflation is the same everywhere. We therefore disagree with the learned trial judge that the classification has no rational nexus with the object sought to be achieved by the 1980 Act. In our view, the residential qualification imposed by the Act constitutes a permissible discrimination, and therefore does not violate the equality provision of art 8(1) and as such, it is not null and void under art 4(1) of the Federal Constitution.
>
> In this appeal we take into serious consideration that the Act is not a law concerned with fundamental rights. It is a legislation in the area of economic or social welfare to confer extra benefits to pensioners resident in Malaysia. As such, the learned judge erred in principle when he appeared to have applied a stricter standard of review. As indicated by us in the *Malaysian Bar* case, to attain constitutional validity in this type of legislation, it is sufficient if the classification made by the statute has a governmental purpose. In this particular case, we are of the opinion that the appellant has satisfied us that the classification in the Act has a reasonable governmental purpose, and consequently, the restriction imposed must be held to be constitutionally valid

[91] Consequently, both Act A1462 and PU(A) 59/2016 are in my view constitutional and valid when they are read and applied together, contrary to the respondents' contention that Act A1462 is invalidated as the result of PU(A) 59/2016. It would have been different if the purpose of PU(A) 59/2016 is also to further ameliorate economic inflation benefitting the serving judges only. This is probably also the reason why the Yang di-Pertuan Agong did not invoke the permissive adjustment in s 15B(2) of the amended Act 45 to benefit the retired judges including the respondents.

[92] Moreover prior to the enforcement of PU(A) 59/2016, the respondents seem contented with the amendment brought by Act A1462, otherwise litigation would have been instituted by the respondents much earlier.

[93] Though I sympathise with the respondents, I am constrained to find

that the benefit conferred by PU(A) 59/2016 is inapplicable to the respondents and accordingly, the respondents have failed to prove there was actual loss suffered as so computed and contended by them. It follows that the respondents have not proved there was any disadvantage suffered to support their challenge as so prayed and allowed by the High Court.

[94] For the foregoing reasons, the learned High Court judge's findings are erroneous and that justified appellate intervention.

CONCLUSION

[95] I will hence allow the appeal and dismiss the cross-appeal. There is no order as to costs.

Appeal dismissed and cross-appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh